IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

ePLUS, INC.	:	Civil Action No. 3:09CV620
vs.	:	
LAWSON SOFTWARE, INC.	:	January 21, 2011

COMPLETE TRANSCRIPT OF THE JURY TRIAL

BEFORE THE HONORABLE ROBERT E. PAYNE

UNITED STATES DISTRICT JUDGE, AND A JURY

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P R O C E E D I N G S

THE CLERK: Civil action number 3:09CV00620, ePlus, Incorporated, versus Lawson Software, Incorporated. Mr. Scott L. Robertson, Mr. Craig T. Merritt, Ms. Jennifer A. Albert, and Mr. Michael G. Strapp represent the plaintiffs.

Mr. Daniel W. McDonald, Mr. Dabney J. Carr, IV, Ms. Kirstin L. Stoll-DeBell, Mr. William D. Schultz, and Ms. Rachel Hughey represent the defendant. Are counsel ready to proceed?

MR. ROBERTSON: Yes, Your Honor.

MR. McDONALD: Yes, Your Honor.

THE COURT: All right. We'll take plaintiff's JMOL motion first.

MR. ROBERTSON: Good morning, Your Honor.

THE COURT: Good morning.

MR. ROBERTSON: I'm going to be arguing plaintiff's judgment as a matter of law with respect to infringement, and Ms. Albert will be addressing plaintiff's judgment as a matter of law with respect to the invalidity issues.

Your Honor, Rule 50 provides that judgment as a matter of law may be granted when a reasonable jury would not have a legally sufficient evidentiary basis to find for the party Lawson on that issue. ePlus moves for JMOL that Lawson infringes all the asserted claims of the patents-in-suit, both directly and indirectly, both through inducement of

infringement and contributory infringement.

I'm not going to go through all the asserted claims, Your Honor. I know Your Honor is familiar with them, and that would just take up too much time, and I know we're pressed for time here this morning with the Court's schedule this afternoon, but let me hit a high point, first start off by saying, we contend that the defendants non-infringement case in this proceeding has been really based on misdirection, that they have ignored the Court's claim construction with respect to catalog. They rewrote the provision for published by a vendor to suit their manufactured non-infringement positions.

It required the Court, I think midcourse through this case, to issue the instruction with respect to published by a vendor to bring some clarity to what the Court intended when it gave its instruction with respect to what a catalog is.

It did not mean, as the defendant contended, that the item data associated with the catalog could not be selected -- or had to be selected by the customer or modified or deleted or reformatted or be an entire catalog. That was never intended by the Court, and its revised published-by-a-vendor construction made that clear, and I think the arguments made on that, the non-infringement arguments that were based on that have no sound footing in the record on this case.

We believe that the best evidence in this case has come from, indeed, Lawson's own witnesses and documents. Mr.

Christopherson's admissions, Mr. Lohkamp's admissions, Ms. Raleigh's admissions all point to the fact that the claim elements of all the claims have been satisfied by five separate configurations that are accused in this case.

Lawson's own documents support the infringement in this case. They are uncontradicted. Responses to RFPs that were shown repeatedly to the jury demonstrate that the elements asserted in these patents were satisfied.

They were vetted by in-house legal counsel and the engineers at Lawson to be as accurate as possible, was the testimony. Those documents showed that Lawson, indeed, does provide catalog content. They implement the systems, they maintain, the service --

THE COURT: Is your theory that the item master contains any complete catalogs from a published by a vendor as I've defined it?

MR. ROBERTSON: I think it's capable of --

THE COURT: Does it -- we'll take things one at a time. Just answer the question. In what you know of it, does it contain any complete catalogs that are published by a vendor?

MR. ROBERTSON: The item master with the vender table and the vendor lookup together was the evidence that constitute a catalog. That is the evidence I think uncontradicted by any party. It was the evidence provided by Dr. Weaver, it was the

evidence shown by Mr. Niemeyer in the source code. Those three things together constitute a catalog, because those databases are connected --

THE COURT: Item master plus what?

MR. ROBERTSON: The vendor item table and vendor -- I'm sorry. I'm refreshed that that --

THE COURT: It's just those two, isn't it?

MR. ROBERTSON: Yes, sir.

THE COURT: And that constitutes a catalog.

MR. ROBERTSON: Yes, sir.

THE COURT: That has catalog information taken from data published by vendors about their products.

MR. ROBERTSON: Exactly.

THE COURT: And it's put in there, into the -- the item master comes empty.

MR. ROBERTSON: It can.

THE COURT: Well, it comes empty unless somebody put something in it. When it starts from the factory and it's a newborn baby, the item master is empty.

MR. ROBERTSON: That's fair, Your Honor.

THE COURT: And then information is loaded into it. Information is loaded into it by either the customer or by Lawson acting under a contract for the customer.

MR. ROBERTSON: That's right. It can happen in a variety of ways, as I think the testimony showed.

THE COURT: And it is always -- it's not Lawson, but it is always the customer who selects what goes into the item master, because it is the customer who, in the first instance, has constituted what it wants in the legacy system that is transported or imported into the item master, or is the customer who tells Lawson what it wants in the item master; is that right or wrong?

MR. ROBERTSON: I'm not certain that the evidence is unequivocal on that, Your Honor.

THE COURT: Who else does it?

MR. ROBERTSON: Lawson, for example, could say, you're going to want this. The customer will say, well, I need some -- this kind of data, and Lawson can volunteer and say, well, we can provide you this data.

THE COURT: Then that's the customer saying, okay, yeah, I do want that, too, I want the parts for a Ford, and the Lawson representative says, well, you know, you sell Cadillacs, you've got a market for Cadillacs in your customer base, don't you want the Cadillac, yeah, I do. So it's the customer who makes the decision what goes in there, and Lawson doesn't just come in and say, here, this is what goes in; right?

MR. ROBERTSON: I think Lawson can make the suggestion to the customer --

THE COURT: But that's not the same thing as making the decision. Let me ask you something. Are you married?

MR. ROBERTSON: Yes, sir.

THE COURT: You make a suggestion to your wife, she decides to take your suggestion. Who's made the decision, you or her? And you better answer that right, or you're going to be in trouble. She's made the decision.

MR. ROBERTSON: Yes, sir.

THE COURT: Same difference.

MR. ROBERTSON: I don't think it's germane, actually, to --

THE COURT: Well, it might be germane in respect of their position.

MR. ROBERTSON: I think that is their position. I don't think it's germane to the Court's claim construction as to who actually selects it. What we're talking about here is a database that has item information.

Who made the decision to put that item information in there, in a system is not relevant to the Court's claim construction. Anybody can make that decision. It doesn't matter. In this case, if it happens --

THE COURT: If you win on the catalog, it's all over anyway; right, on the catalog issue? There's nothing else to be done?

MR. ROBERTSON: Well, there's been some arguments made that the Lawson system can't select the catalogs to search. I think that wasn't supported by the evidence. I

think there --

THE COURT: I know, but you have to first have a catalog to search as every witness in the case has said, so if the case turns -- if you win summary judgment on the issue of what the evidence is as to what a catalog is, the case is over for 11 of the 12 claims; right?

MR. ROBERTSON: I think that's true.

THE COURT: '172, claim one, is the claim that doesn't have the catalog mentioned in it.

MR. ROBERTSON: Yes, sir.

THE COURT: All right, excuse me. Go ahead.

MR. ROBERTSON: It has multiple databases. I don't know if the Court wants me to review the additional evidence on the catalog itself, but there were a variety of ways that the Lawson system can import catalog data that's made available to the customer, so the customer itself can go and use that EDI protocol 832, do the catalog import process.

We saw the vendor catalog load PO 536 program that Lawson provides and will actually load the catalog data for the customer. We saw the punchout scenario in which the customer tells Lawson what kind of catalog access it wants to their punchout partners, and Lawson sets up and provides the whole protocol communication procedure for that.

Lawson designed it, created it, implemented it. The testimony was from Mr. Christopherson, for example, that the

customer using that configuration never leaves the Lawson system.

And so we think, Your Honor, with respect to the catalog issue, that's been completely satisfied. There was testimony that Lawson hosts these systems for their customer so they can access them remotely and use the catalog content that's been provided by Lawson on those hosted systems. And so that's a situation, I think, Your Honor, where Lawson would be providing, indeed, and selecting catalog content for that hosted solution, and that would be a direct infringement.

With respect to the issue of searching by vendor, we saw RFPs in which the question was made, can I search by vendor, and Lawson unequivocally answered, yes, that comes right out of the box with the system. Can you search by keyword? I think that was unequivocal as well in the evidence.

Dr. Weaver put on demonstrations to show the variety of configurations that were infringing through RSS. In fact, Ms. Stoll-DeBell introduced through Mr. Christopherson the screen shots of the use of technology to show that claims were satisfied. I think it was very telling that Lawson offered no demonstrations whatsoever of the system to try and show that it was in a non-infringement mode.

I think we saw evidence concerning the use of the classification codes, the UNSPSC, in which the system comes capable of loading that right in there, and, in fact, we showed

a demonstration doing searches and drilling down to find equivalent items, generally equivalent items. Even Mr. Shamos relied on that white paper to show the classification schema, but then he tried to run away from it when it showed that when you get down to the commodity level, you are dealing with substitutable items.

THE COURT: That was where he was making the point that you can't get equivalent items by looking at the code, the last digits of the code because not all black pens are the same?

MR. ROBERTSON: Yes, but, of course, the paper that he relied on said it was substitutable, and when I asked him the question, can't you just look at it and see -- the hits, whether or not this black pen is similar to that black pen when you get the hit results.

There's no question that there's the requisition and purchase order capability. I don't think that's even been challenged by anybody. There was some argument that the search index wouldn't -- compelled you to search the entire database for items. I think Dr. Shamos tried to analogize to a pantry that he had alphabetized, and then when he wanted to look for apples, he had to go all the way to zucchini. Dr. Weaver explained how a search index works. There's independent evidence --

THE COURT: Well, when you open the pantry, and if

you had your spices organized alphabetically, as some people might have, if you know you want coriander, you go to the C part of it, the coriander, and you get that. You haven't searched the whole drawer of spices to go down even to cumin, for example, or to some other spice the name of which escapes me. What is it they put in chicken salad and tuna that begins -- tarragon. So you haven't gone all the way down.

MR. ROBERTSON: That's the point of the whole index. Like the analogy to the book I made, the *History of the Civil War*, if I want to see about the Battle of Vicksburg, I don't need to read through every single page. I can go to that index, and it points me to where in that database, if you will, that book, I can find a discussion about the Battle of Vicksburg.

THE COURT: It's just a form of short, quick, easy search, not a lengthy search.

MR. ROBERTSON: It's an index search for speeding up the whole process and for searching just selected portions of the database.

THE COURT: When I look at the index, I look for V. I look for Vicksburg.

MR. ROBERTSON: Exactly.

THE COURT: That's a search, according to you; right?

MR. ROBERTSON: That's a search of a selected portion of the database, because I've used that tool to get me to where

in the database I need to go. In fact, we had a graphic of the -- I believe it was the Webster's computer dictionary. We said, that's exactly why you have a search index, so you don't need to search the entire database in order to find the file record that you want.

Mr. Niemeyer, the source code expert, the only source code expert to testify in this case, notwithstanding that the defendant said they were going to have a rebuttal source code expert that they never called, Mr. Niemeyer explained how that can be used in order to identify the file records. So I think that was essentially uncontradicted in this case.

Again, selecting the catalogs to search, Dr. Weaver showed how I could, if I had multiple catalogs and I wanted to search for catalogs that had laptop computers, for example, I could enter that keyword and only get the catalogs that had laptops to search. I could also have those user-generated criteria that Mr. Christopherson, I believe, and Mr. Lohkamp, and I believe even Dr. Shamos conceded that you could put the vendor name in those user-identified criteria and search by vendor name.

So there are a variety of ways to do that, and, again, I would come back to the RFPs which unequivocally represented in every instance when a customer said, can I search by a vendor name, yes was the answer. There was never a no answer demonstrated in this case.

Inventory availability shown through a variety of ways. Those EDI protocols can bring back information. Dr. Weaver showed it in his demonstrations. He also showed it through the punchout process. We saw all those --

THE COURT: But it would be an error on my part to grant a judgment of infringement on all claims, would it not, because when you finished the day with Dr. Weaver, he identified certain claims that were infringed in certain patents and other by certain systems. And that would be a wholesale grant that maybe would be beyond the scope of the evidence, wouldn't it, if I did what you want me to do?

MR. ROBERTSON: No --

THE COURT: Don't I have to do it by which system deals with which, infringes which claim?

MR. ROBERTSON: Yes, absolutely, Your Honor.

THE COURT: How am I to do that?

MR. ROBERTSON: Because, Your Honor --

THE COURT: Do you have a little table that shows me which ones I should grant, make the grant of if I grant it?

MR. ROBERTSON: I do.

THE COURT: If I ask you to produce a monkey, will you do that, too, next time?

MR. ROBERTSON: I'll try. Yes, Your Honor, in fact, I'm sorry. I think I only have one copy of this.

THE COURT: Keep the one you've got.

MR. ROBERTSON: It is proposed in our verdict form, Your Honor. We have asked the jury to find --

THE COURT: Yes, but that's a rare document you have there. It is the only document in the case of which there is only one copy.

MR. ROBERTSON: That's true. But our verdict form does lay out, on a configuration-by-configuration basis and a claim-by-claim basis which claims we do, in fact, feel are satisfied.

THE COURT: What is your understanding as to Lawson's position on the issue of catalog? What is it that -- why is it that item master doesn't constitute plus vendor item table -- excuse me, doesn't constitute a catalog? What is their position as to why it doesn't, in your view, and what do you say in response to that position?

MR. ROBERTSON: Well, Your Honor, quite frankly, I've always been a little bit confused by it, and I think that was kind of the effort that was being created here. What I can suggest to Your Honor is there was a graphic that was used, I believe with Mr. Christopherson, and I've got extra copies of that, Your Honor. I don't know if you have it, but essentially what this summarizes or suggests -- if you'd like, I can hand up --

THE COURT: I had it here earlier yesterday, and I hope it isn't among the things that I directed to the recycle

bin, because I had notes on it.

MR. ROBERTSON: It's on the screen now, too, Your Honor.

THE COURT: Here is my copy. Item information changes, yes, okay. I regard that as a best-seller in this case, because I think it helps me understand, but I'm not sure I understand, so tell me.

MR. ROBERTSON: Let me -- so this is what I understood the argument to be, or at least the way it was crystalized when Mr. Christopherson testified, and then I cross-examined him, and then there was Dr. Shamos who testified with respect to this, too. So I think -- the point of this, I think, Your Honor, was to suggest that if a customer selects the desired items or if the customer adds additional item information or if the customer deletes --

THE COURT: Let's start with the beginning. The vendor changes the information to new electronic format. In order for it to go into an electronic system, the vendor has to put it into some electronic system, doesn't it?

MR. ROBERTSON: Well, the vendor can do it in a variety of ways. It doesn't to do it that way. It can do it through the EDI load-up.

THE COURT: I understand, but at a very basic level -- you all keep talking about the high level. I like to get down to the basic level. At a very basic level, it is true

that at some point, before anybody deals with it, the vendor, the information that a vendor has about his products have been somehow put into electronic form, either originally or have copied it into electronic form to make it available for use; is that right?

MR. ROBERTSON: I think that's a fair statement. In a variety of different ways it can do that.

THE COURT: Yes, lots of ways. So what?

MR. ROBERTSON: Yeah, so what.

THE COURT: What does that have to do with whether or not it's a catalog? I'm trying to understand what your position is.

MR. ROBERTSON: I don't think it matters. In fact, I think what I would do, Your Honor, is I would take vendor, and I would cross out changes information to a new electronic format and, and I would basically say, vendor gives information to customer in whatever way it wants to do, and that's consistent with published by a vendor in the Court's definition. It makes it available, generally known, or discloses it. Indeed, even in the legacy systems, and those are the systems where customer has an old procurement system --

THE COURT: I've got my catalogs.

MR. ROBERTSON: Right.

THE COURT: Basically a legacy system is I've got my stuff set up the way I want it, and now I'm going to buy a new

system, so I change it over to the other system.

MR. ROBERTSON: Yeah, just transfer it over. And even if you need to reformat it because it's going to have to be reformatted to be configured in Lawson's catalog.

THE COURT: In that instance, I could have, if I'm a customer -- you can tell me if this is right or wrong -- according to the evidence, I could have a database that has in it the catalogs of three vendors, for example, either all or part; right?

MR. ROBERTSON: Yes, sir.

THE COURT: And in that event, all that happens is whatever I've got in my legacy system goes into the Lawson system by virtue of the Lawson software and the application interface; is that right?

MR. ROBERTSON: Well, they come over and they transfer it for you.

THE COURT: Somehow it has to get from here to here.

MR. ROBERTSON: Yes, and they provide that service. I think --

THE COURT: In that event, if you did that with the item master -- if I had three catalogs in my database as a customer, in my legacy system, and it's transferred, it's transferred into Lawson's item master plus vendor table. Then those three catalogs are in the item master and vendor table database; is that not right?

MR. ROBERTSON: That's exactly right, Your Honor.

THE COURT: And then whether or not -- your position is whether or not any customer actually does that, the fact that that can be done, the capability exists to do that, that's sufficient to constitute infringement. That's at the most basic level; is that right?

MR. ROBERTSON: I think that's correct at the most basic level.

THE COURT: Does the law support you on the capability issue that you are arguing?

MR. ROBERTSON: I think it certainly does. I think, as the Court knows, because the Court has adopted the jury instructions from both the Ariba case and the SAP case, capable of infringing is sufficient.

Remember, this item master, this system can't do anything without catalog data. I mean, I can't -- no one buys it just to keep it and keep it there empty. And the testimony is just, you know, unequivocal from Ms. Raleigh and others that Lawson does transfer that legacy data from the system and builds a system, and when they make that system, whey they build it and when they put that catalog content in, or in any way made available to the customer through various software programs they provided to import that catalog data, that is a system that is now in an infringing mode.

So if you were to say, oh, if I just bought the

system and never loaded catalog data in it, would that be infringing, I suppose not, but who would do that? Why would you have this whole procurement software if it wasn't going to be able to perform the functionality that it was intended to do? That defies common sense.

THE COURT: We don't have any of that in this case anyway. We have evidence of use by customers of the Lawson system in a way that makes Lawson a very formidable force in the market. It's a big company, and it didn't get that way by selling systems that didn't get used.

MR. ROBERTSON: I think that's exactly right.

THE COURT: I don't think that's an issue, and they never have contended that. They are big hitters in the program. They have a good product, they say, and they're selling it, and people are using it. It hasn't been an issue, I don't think.

MR. ROBERTSON: Obviously, I can continue to discuss the criteria for selecting the catalogs and searching for items when we saw that in the demonstrations. We saw the demonstrations of the punchout --

THE COURT: Can you do, do you believe, according to the evidence, search the item master/vendor table combo and find, if I have a need for -- let's take the medical area. I have a need for syringes, and there's a different UNSPSC code for one-inch syringes, two-inch syringes, and half-inch -- or

actually it's cc, I guess. One-half cc, one cc, and one and a half cc. There are three different ones. But I know that if I need to -- I can't use a half cc syringe to inject a one cc dose, but I can use a one cc syringe to inject a half cc doze. All I have to do is load it differently.

So for me, in the hospital, if we're down in the area where we're out of one cc's, I say to myself, okay, I want to know if we've got any one cc's. Can the Lawson system find whether in my inventory, either the hosted site or otherwise, I have or have access to any one half cc's or one cc syringes, during the process of a search?

MR. ROBERTSON: I think it certainly can happen, because you can actually put in keywords, both that are alphanumeric, both letters and numbers, in order to get to where you want to get and drill down on the search.

Now, the argument has been made, because Your Honor prefaced this by starting out with the UNSPSC. The argument has been made that when you go from that -- I'm not going to get this right, but I think it was family, segment --

THE COURT: You can down the tree.

MR. ROBERTSON: Class and commodity, when you go down that hierarchy, you get to a position where at some point there can be some comparison to see what kind of equivalency there is, and the argument has been made both in this case and in prior cases that, well, you know, in fact, the document we saw

said even has another classification. You can have it down to even ten digits or five levels of classification beyond just the commodity level, so that's available as well.

But that the argument is, and this is a technical term in the computer world, it doesn't have sufficient granularity. That is, I can't get down to the exact syringes that I might compare.

THE COURT: I've got two black pens here.

MR. ROBERTSON: Yes, sir.

THE COURT: This one is a $100 pen that my law clerks gave me years and years and years ago. This is one the government gave me, and I will pledge to you we don't have any hundred dollar pens. Can Lawson bring me to a place that has these two on here, and can I say, well, I want the $100 one instead of the other -- both these things do the same thing, I can tell you. I've used them both.

MR. ROBERTSON: If you had a database that had the keyword searching capability that would permit you -- I don't know what kind of pen the partners gave to you --

THE COURT: My partners didn't do it. My partners were so tight they would never do anything, even give me my money when I left.

No, they treated me fine. They did a whole lot better than the law clerks, but this is a Waterman pen, and this is a Bic -- yeah, a Bic.

MR. ROBERTSON: The answer to your question, sir, using the UNSPSC again, you probably can't get down to that level of granularity, that level of precision, but you don't need to if the system is capable of at least coming up with some items that are generally equivalent.

THE COURT: When I get down to the last one, the very last one of those searches, will it let me choose between all these pens?

MR. ROBERTSON: It would bring you up a list of --

THE COURT: I don't want black pens --

MR. ROBERTSON: It will get you to all black pens, Your Honor, yes.

THE COURT: That's all I want to know.

MR. ROBERTSON: Yes, sir.

THE COURT: All black pens in the system.

MR. ROBERTSON: Then you can look and see --

THE COURT: I can look at them, and I can say, well, those are generally equivalent because they do the writing, but I'll tell you what, I've lost this one, and I really want in my pocket the same kind of pen that my law clerks gave me 20 years ago. Whoops, I'm going to buy the $100 one even though the Bic does the same thing. Can Lawson give me the Bic and the hundred dollar one?

MR. ROBERTSON: You will get -- if UNSPSC has been entered in there, you will get the results that show you what

matches that commodity, and then you can search those results --

THE COURT: That is in the inventory.

MR. ROBERTSON: That is in your catalog.

THE COURT: In the item master.

MR. ROBERTSON: Yes, and you can search it and say, this is the one I want. You can just read it and say, I will take that one.

THE COURT: At some level, don't you have to, at some point, have a human being look at the various things and say, that, to me -- they all do the same thing, they are different prices, and I'm on an economy kick so I want the one that's the cheapest?

MR. ROBERTSON: At some point, a human being has to interact with all these features and functionality. Human beings have to enter the keywords. Human beings have to know what they want --

THE COURT: I guess my point was, in your view, does the patent require that it be the computer which identifies from all these pens, some of which are red, those which are black, or can the buyer, the user say, okay, well, these two are black, and I'm not going to worry about the red one?

MR. ROBERTSON: That's all you need to do. The computer needs to assist you in getting to a result where you can then make a decision, and it does that.

THE COURT: Okay.

MR. ROBERTSON: And it does that by way of keyword search. If Your Honor knew the particular type of pen that you wanted, and, you know, you typed in Parker black pen, you would probably get a variety of results of Parker black pen that you could then look at it and determine whether or not there was genuine -- a general equivalency for those pens or you wanted one that was $5.95 or one that was $12.95 but still provided the same writing capability.

THE COURT: Back to item information changes. The customer then, after the vendor gives the information to the customer, the customer selects the desired items that go into the item master vendor table. You agree with that, don't you, that that can be done? You also say Lawson can do it, and it doesn't really make any difference.

MR. ROBERTSON: Let me cut to the chase, Your Honor. I agree that all of this can be done, and my point is, so what? Who cares? It doesn't matter under the Court's published by a vendor. The customer can select it, the customer can delete some, the customer can add additional information. The customer can take -- one of the arguments that's made is, well, I take a textual description of the item, and I take it from 80 characters, for example, down to -- I forget the precise number, 30 or 32 it was represented. It's still a textual description of the item. It has to contain enough information

for me to be able to know what it is.

I think Mr. Yuhasz from Novant testified that, you know, they use abbreviations for syringe, but they still know it's a syringe. That doesn't destroy the fact that it's textual information about an item in there. So this argument that goes from 80 characters down to 30 characters, for example, what does that matter?

THE COURT: Mr. Yuhasz, basically he was saying he looks at the list that the vendor has, and they convert that list, and let's call this pen comma black, and they convert it to P comma B, for example, so it will be under the number of character limits, but they know in their lexicon that what came from the vendor is a pen comma black. They just simply convert it to a P comma B. That's what he said, wasn't it?

MR. ROBERTSON: Yes.

THE COURT: What difference does that make?

MR. ROBERTSON: None, but that's why it's an argument that I think -- it's been promoted here as a non-infringement argument. Is that still a textual description of the item under the Court's construction? Absolutely. There's no character limitation in the Court's construction, nor was there any character limitation described anywhere in the patents --

THE COURT: No, the difference is, does it make a difference if the vendor information is changed by the user into another form, and that's what's recorded in the catalog.

MR. ROBERTSON: I don't know why it would, because it's the vendor that provided that information in the first place, and it's the customer that then took that information and conformed it so it would fit into the Lawson system. The argument was made that in many instances, the customer negotiates prices with its vendors, and that negotiated price, which may not be the list price, then gets loaded into the Lawson catalog database.

What difference does that make, Your Honor, whether it was a negotiated price or a list price? It's still a price, so that, again, was, I think, just an argument of misdirection, of an attempt to mislead and confuse the jury as to what really is the construction. The construction that the Court made, I think, is fairly plain and fairly clear, and it is satisfied no matter what happens after the customer gets this information.

On the next level, what does it matter if the customer loads the new info into the Lawson database? We know, in many instances, that Lawson has actually provided the functionality for them to do that in a number of ways, but I guess it's been conceded Lawson will certainly do that for you and charge you a hefty price with respect to that.

I have not gone through on a claim-by-claim basis, but I will provide the Court with the configurations in the claim. The Court's very familiar with the claim.

I think I did talk about inventory availability. I

don't know if the Court has any other questions. I think, just to summarize, that the most compelling evidence in this case that ePlus should be entitled to a JMOL of infringement has come from the defendant's own mouths and their own documents and the demonstration and the source code that we think established beyond peradventure that Lawson indeed infringes these claims in the configurations as set forth by Dr. Weaver in his testimony. Thank you.

MS. HUGHEY: Good morning, Your Honor.

THE COURT: Morning.

MS. HUGHEY: I'd like to start by clearing up something that may not have been clear from Mr. Robertson's discussion today. The fact is, if there's no catalog as defined by the Court, then Lawson does not infringe, and we don't have to go any further. However --

THE COURT: I think he said that.

MS. HUGHEY: Yes. However, even if there are multiple catalogs, Lawson still does not infringe. It doesn't do the searching, the selecting, the equivalent items, the things Mr. Robertson went into. So I just want to make that clear on the record, that catalogs are not the only non-infringement argument in this case.

However, because it was discussed in great detail with Mr. Robertson, I'd like to start with that. I think both parties agree that a full vendor catalog, like the Sears

catalog, meets the Court's definition of a catalog, and I think both parties agree that at some point, single items don't meet the definition of a catalog, like a phone list. So the question is, where is that line drawn.

What ePlus wants to do is drawn a line and say, if an item, at some point, was in a catalog at any point, then it's a catalog. Even if --

THE COURT: If I'm a user, and I have in front of me a catalog, and I say, well, look, all I really am interested in are the sweaters. I don't care about boots and fly rods or jack hammers and other things, and I take all of the section of that catalog out of the vendor's catalog and put it into my catalog, my item master, I have put a catalog or part of a catalog in there, haven't I?

MS. HUGHEY: That's an interesting argument, Your Honor, but that's not the argument that ePlus is making --

THE COURT: Answer my question, because whether it's interesting or not to ePlus, it is interesting to me. Haven't I put a catalog into that database?

MS. HUGHEY: So you're saying that you've ripped a page out of that catalog --

THE COURT: No, whatever. I've taken the whole section.

MS. HUGHEY: That's not a vendor catalog.

THE COURT: Not yet. That's part of a vendor

catalog.

MS. HUGHEY: That is a piece of data from a vendor catalog.

THE COURT: A piece of data. Now, suppose that I take the whole catalog and put it into my database; is that a catalog? Is that a vendor catalog? Yeah.

MS. HUGHEY: I think the evidence in this case would be yes. If you took the entire Sears catalog, it would be considered still a catalog.

THE COURT: Now, if I take Sears -- somebody used Montgomery Ward. I didn't even know it was still in business. How did you know it was still in business?

MS. HUGHEY: Saw it on eBay®.

THE COURT: But I take three catalogs, I take L.L.Bean, Magellan, and somebody else, and I put them in my database, in my legacy system so it's got catalogs. It's got -- what I've got in my legacy system is vendor catalogs; right?

MS. HUGHEY: No, Your Honor.

THE COURT: No?

MS. HUGHEY: No.

THE COURT: Why not?

MS. HUGHEY: The actual facts in this case are --

THE COURT: Why don't I have a catalog there under what I just asked you?

MS. HUGHEY: I feel like there may be two questions pending. The general question, is a Sears catalog a catalog, yes. The question of the Lawson's customers' legacy system is a catalog is no.

THE COURT: Even if they have all of those three catalogs in there, and you bring it into the -- and Lawson imports it into the customer's system for them, they don't have catalogs in the item master and vendor table?

MS. HUGHEY: In your hypothetical, that may be the case, but those aren't the facts that we're dealing with.

THE COURT: That doesn't make any difference. How your customers use it don't make any difference. If the principle is correct that if your system is capable of doing that, then you are infringing. Do you agree as to the capability argument that Mr. Robertson made?

MS. HUGHEY: I disagree for two reasons. With respect to the specific issue of the capability, the fact of the matter is that whether a party is capable of infringing is not the question. It's whether it actually --

THE COURT: No, it's not whether a party is capable of infringing, it's whether the system, once it's sold, is capable of an infringing use; right?

MS. HUGHEY: That's right. Same question, same answer. Capability is not the same as infringement.

THE COURT: What case is that?

MS. HUGHEY: I'm going to send you the *Ball Aerosol* case. The cite is 555 F.3d 984, and it's a 2009 Federal Circuit case. I'll read from it first.

THE COURT: Has anybody highlighted it here?

MS. HUGHEY: I haven't highlighted it, Your Honor.

THE COURT: Where do I go?

MS. HUGHEY: I'll direct you to page eight of the actual -- in the right-hand corner, it says page eight, and the heading starts on the left side, infringement.

What happened at the District Court was the District Court found infringement right under the heading infringement. We next turn to the second sentence. The District Court found infringement because the accused travel candle, quote, is reasonably capable of being configured in such a way that the holder is supported by the cover when the cover is placed open and down on a surface.

The Court then went on, the next full paragraph at the top of the second column, BASC's reliance on the cases that found infringement by accused products that were reasonably capable of operating in an infringing manner is misplaced since that lines of cases is relevant only to claim language that specified that the claim is drawn to capability.

What this is saying, Your Honor, is that if the claims -- -in this case require actual catalogs, not the capability of having catalogs, and because that element is not

met, there is no infringement.

To answer your question, I do agree with ePlus's position that capability allows for infringement. The second question with respect to the specific issue of catalogs is that here, there is no catalog. Like I said, both parties agree that at some point data that's been drawn from a catalog, a vendor catalog and changed is not a catalog.

THE COURT: But you don't even agree if I put my whole catalog in, that I've got a catalog in the item master vendor table.

MS. HUGHEY: I would agree that that would be an infringement if that happened, but it does not, nor is it capable of happening. That's my point.

THE COURT: Why isn't it capable of happening? In fact, every witness that testified said it is, including Mr. Christopherson. What he said was, in words of one syllable, sure, that can done, but that isn't the way it's usually used. That's what he said.

MS. HUGHEY: The evidence that was coming in was that the item master -- all the evidence that came in about the item master is that it is uniquely organized and created by a customer, it does not look like a published catalog, it's a private collection of personal items, has special price information. These are not -- this is a not a catalog, a vendor catalog like the Sears catalog. This is a grocery list.

THE COURT: That isn't the question. Your witness testified that the -- that I could put one or more entire catalogs into the item master if I wanted to depending on the capacity of the item master I bought, and your position is that even if I do that, the item master parts list, vendor item list isn't a catalog, and I don't understand that at all.

MS. HUGHEY: Your Honor, the evidence that came into this case is that the item master is like a grocery list, and so, yes, people were saying in theory -- in context, they were talking about what kind of information could be drawn in, but in reality, all the evidence came in that that item master is a grocery list. It is not a catalog.

THE COURT: What about something -- you make it sound like a grocery list that my wife goes to the store or sends me to the store with a list of 20 items. There are hundreds of thousands of items in most of these item masters, and they came -- all that information came from vendors, and it was -- and the information -- your user transformed some of it, edited some of it and moved some of it, gave some information that's not in the catalog such as price because they worked out a special price deal, but what's in the catalog that is created by the item master is the price, or what's in the item master, whatever you want to call it, is the price, for example.

Now, I don't understand how you can have something that's a hundred thousand items, or in many instances more than

that, and 10,000 vendors and you don't have a catalog of what's in there just because it came from multiple sources. That's what you are saying. You're saying you can't -- you don't have a catalog because it came from 10,000 different vendors or a thousand.

MS. HUGHEY: No, that's not why it's not a catalog. It's not a catalog because it doesn't meet the Court's definition of catalog. The Court's definition of catalog requires an organized collection of items and associated information published by a vendor.

At no point was any of the information pulled from a catalog and then transformed, as we've gone through in great detail, and then put into the item master, also known as a grocery list.

THE COURT: In fact, that's exactly what Mr. Christopherson said did happen under the ETL process that he testified to in connection with this exhibit, and the T in that is transformation. That is exactly what he did.

MS. HUGHEY: The transformation is the whole point of change. There is a -- everyone agrees that the Sears catalog or the Montgomery Ward catalog is a catalog. It comes from that point, it is -- it is changed and then put in the item master like a grocery list. That is the T. That is what we're talking about. It's not the same.

THE COURT: I don't understand why it isn't.

MS. HUGHEY: It's not the same because it doesn't meet the Court's definition of catalog. The Court's definition of catalog is an organized collection of items and associated information published by a vendor.

THE COURT: What is wrong with that? You can't just cite the whole thing. You now need to tell me what part of the definition it doesn't fit.

MS. HUGHEY: Yes. Specifically the published by a vendor. It requires the items --

THE COURT: Why isn't it published by a vendor?

MS. HUGHEY: The items in the item master have never been published by a vendor.

THE COURT: Of course they have. Where did they come from in the first place?

MS. HUGHEY: There was a published vendor catalog.

THE COURT: And that was published by the vendor.

MS. HUGHEY: That was.

THE COURT: Then I go to the catalog, I look at it, and then I have Remmington shotgun model 12 in there. Well, my system won't take a Remmington shotgun model 12, so what I do is I take that vendor information, and I transform it to RSG and 12 so it will fit the number of characters.

All I've done is transformed the exact data, loaded that into my system, and I have my own little catalog there. If I want a AK-47 and a Berretta and a long gun, and I take

that and put it in there, too, and I change all those definitions, what I've done is take from that catalog those four kinds of guns. Then I go to the next part of the catalog, and I take the four kinds of ammunition for those four kinds of guns, and then I go to the next part of the catalog and I take the cleaning equipment for that kind of guns, and that's all I want.

And I take that information, which is vendor published information, I put it into my system, and when I do, I transform it to a smaller segment of data so that it will fit the computer that I'm using. Why on earth isn't that still data published by a vendor, it's just been transformed into some different format?

MS. HUGHEY: That's a database, right? That list is a database much like you could say your typed up grocery list is a database. It's not an organized collection of items associated --

THE COURT: Why isn't it an organized collection? It's very organized. It's my guns. I've got it all under guns. I've got guns, ammunition. That's about as organized as you can get.

MS. HUGHEY: ePlus's argument is that that grocery list, that database is multiple catalogs, and the way they get there is by saying, well, there's a metal catalog, you could search metal; and there's a blue catalog because if any of

those guns or bullets are blue, that's a catalog, but the fact is that just demonstrates exactly why this is not a catalog. It's just a list of items, and it's not published by a vendor.

Yes, at some point maybe that gun was in a published vendor catalog, but then it was put on my grocery list, and I put my own special information; do I have a coupon, do I want to get a specific color.

THE COURT: Does that make the information that came from a vendor, the published information, any less the vendor published information just because you add some individual information to it?

MS. HUGHEY: And take away and transform it. That's the whole point. It's not the same. I think even ePlus will agree at some point a list is no longer a catalog. So the question is, where is that line drawn.

THE COURT: Where is it drawn?

MS. HUGHEY: I believe it's drawn --

THE COURT: Where is it drawn?

MS. HUGHEY: The evidence in this case demonstrates that the line between a catalog as defined by the Court is a vendor catalog with the data in it versus my private personal list with my private personal pricing information --

THE COURT: There's nothing in the Court's definition that even remotely does that.

MS. HUGHEY: But that's my point.

THE COURT: Your argument is, in essence, that if you take a just little bit from a catalog, that you don't -- and make your own smaller kind of catalog out of it, that you are not using data published by a vendor to create your catalog, and you are.

MS. HUGHEY: The words in the Court's construction, published by a vendor, have to have some meaning. If they don't, then it could just be an organized collection of items, and that's what it is when it's on the item master. It's --

THE COURT: I may have erred by injecting published by a vendor into the construction, but I think I've straightened it out by the definition that I've given.

MS. HUGHEY: Even the Court's additional definition recognizes that it has to be -- at some point, that information was publicly available.

THE COURT: It was. It was publicly available in the vendor's catalog. That catalog is made available to the world of people who want it, and you took it, and you took some of it and you fixed.

Look, this is the world of computers, and it really is wonderful that we're able to do these things. What you've got is a system that uses the vendor published information to put together your item master, and the fact that you transform it, I don't think, changes one bit the fact that it is information published by a vendor. That's what it was, and

that's what it is, and I don't think you can change that. Do you have any other argument?

MS. HUGHEY: Yes, I have many arguments. I'd like to make one more --

THE COURT: You don't have too much time.

MS. HUGHEY: Yes, I understand. One more point on this is that ePlus's own expert, Dr. Hilliard, went on record as saying that RIMS did not have a catalog of items, and the reasons that he provided are identical to the reasons that we're talking about in this case. So I just want to make that very clear.

But, Your Honor, as I said at the beginning of this argument, it's not just the question of whether Lawson has a catalog that's relevant to the issue of infringement in this case. There are many other reasons why there is no infringement.

Even if the item master is a single catalog, even if the item master could be considered multiple catalogs, the evidence in this case demonstrates that the other elements of the claim are not met. As Mr. Robertson discussed, the claims in this case, all but, I think, one of them, and I can get you the list, requires selecting and searching these multiple catalogs, and Lawson's --

THE COURT: '172-1 doesn't have any catalog component to it.

MS. HUGHEY: '172-1 does not have a catalog component to it in the claim language. However, I was referring specifically to the selecting and searching requirement, and that is met in claim one of the '172 patent.

Also, claim one of the 172 patent requires an order list, and on the stand Dr. Weaver's infringement position on claim one of the '172 patent was that the order list was met because of the multiple catalogs requirements.

So while I will agree with you the words multiple catalog -- catalogs do not occur in claim one of the '172 patent, ePlus's infringement argument relies on the requirement of the multiple catalogs.

THE COURT: Okay.

MS. HUGHEY: Your Honor, so as I said before, the selecting and searching requirements aren't met. The cross-reference table, the equivalent items, Dr. Shamos went through, in great detail, why, even if there are multiple catalogs, even if you consider the item master, which is just a list of items, to be somehow catalog blue, catalog gun, catalog however they decide they want to sort it -- because at this point, we're all agreeing that it's not a catalog sort of by any specific way by Lawson, right? Even if that could be met, these other requirements aren't met.

He went through in great detail, and with respect to the UNSPSC codes, and I know that you discussed with Mr.

Robertson, again, to clear up any confusion that might have been raised, the UNSPSC codes do not go down to this fifth level in the item master. There's no field to do that.

So just to be clear, Your Honor, when you were talking about black pens, blue pens, that's not what the UNSPSC codes are. They get you to the row in the grocery store that says -- or a Target that says, whatever, bath products, and then from that point you have to go in and find what it is you want by yourself. It's not being done by the system.

So these UNSPSC codes do not meet this requirement of equivalent items, cross-reference table. ePlus has tried to have them meet many different claim limitations.

In addition, Mr. Robertson relies on the parties' statement of catalog. There's no dispute in this case that when the parties were using that term, quote, catalog, they were not aware of the Court's definition, and they explained what they meant. Ms. Raleigh explained that she was using the terminology of the customer. So I think that it's clear on the record that just because that word --

THE COURT: I think that's all smoke and mirrors. Your people knew what catalog meant, and it doesn't mean anything different than what the Court's construction meant, and the meaning those people were playing -- that's just a post hoc rationalization concocted to defend a case. They knew what catalogs were, and they spent a lot of money to deal with

catalogs. The whole business was converting catalogs, so I can't buy that at all, but that's a question of credibility for the jury, isn't it?

MS. HUGHEY: That's right, Your Honor.

THE COURT: So if I were the finder of the fact, I would say, don't spend any time talking to me about that.

MS. HUGHEY: Yes, Your Honor. I'd briefly like to move to the issues that Lawson -- just to be clear, not only does Lawson oppose ePlus's motion for judgment as a matter of law for the reasons that have been set forth, both in this oral argument and during the course of the case, Lawson itself moves for judgment as a matter of law on the issue of infringement.

ePlus has been fully heard, and no -- a reasonable jury does not have a legally sufficient basis to find for ePlus on the issue of infringement.

I'd like to just obviously point out the fact the patentee bears the burden of proving infringement, and the patentee must show that every single element is met. The loss of a single element is insufficient for a finding of infringement.

THE COURT: What does it mean for a claim to be drawn to capability? What does that mean?

MS. HUGHEY: If the claim language demonstrates a capability is what the claim is covering. That's not what's happening in this case.

Your Honor, I understand with respect to the capability issue, I think that's something the parties are also going to dispute with respect to the Court's jury instructions.

With respect to the punchout product specifically, there is no single entity that performs all of the claimed steps either of the method claims or of the systems claims with respect to the punchout product. And for that reason, there's no direct infringement of the punchout product. This Court can grant judgment as a matter of law on that issue.

THE COURT: Thank you. All right.

MS. HUGHEY: With respect to the method claims, I'm not even sure that ePlus argues that Lawson practices the steps of the method claims. That evidence certainly didn't come into the record during the trial.

When Dr. Weaver was opining on the issue of infringement, he repeatedly asked -- was asked and answered whether the customers performed the steps. There was no allegation that Lawson was performing the steps. And really there can be no argument that Lawson does not perform the steps of selecting the products catalogs to search, searching for matching items among the selected catalogs, or maintaining at least two product catalogs on a database containing data --

THE COURT: What if Lawson's hosting the system?

MS. HUGHEY: What about Lawson's hosting system?

THE COURT: What if Lawson's hosting the system?

Isn't Lawson doing it then?

MS. HUGHEY: If Lawson is hosting the system, that doesn't mean that Lawson is practicing the method step of selecting product catalogs to search. That's not what Lawson is doing. Method steps -- for direct infringement of a method claim, it means that a party must perform every single step of the method.

In this case, there's not even an allegation that Lawson performs the steps of selecting the product catalogs to search. There's not even an allegation that Lawson performs the step of searching for matching items among the selected product catalogs.

That allegation was made of Lawson's customers. There's no evidence on the record that Lawson does those things, nor was an allegation made that that would be an infringement.

THE COURT: All right. Thank you.

MS. HUGHEY: Yes, Your Honor, just one final point that was raised in our brief, but I'd like to raise it here at oral argument. ePlus's expert, Dr. Weaver, was extremely conclusory with respect to the infringement allegations made at trial.

THE COURT: You say his testimony was conclusory?

MS. HUGHEY: Yes, Your Honor.

THE COURT: Can you put that one back in the barn?

Anybody who testified as long as he did, it's hard to say it was conclusory. I think the Federal Circuit would laugh me out of the courthouse if I did that.

MS. HUGHEY: No, Your Honor, actually what the Federal Circuit has said -- specifically the means plus function limitations, the Federal Circuit itself has said, to establish infringement of a means plus function claim, quote, it is insufficient for the patent-holder to present testimony based only on a functional, not structural analysis.

Based on this requirement, the Court has repeatedly either granted summary judgment, granted judgment as a matter of law, or reversed District Courts that allowed the infringement verdict to stand when the expert merely made conclusory statements that the function was performed or that the structure element was met without any statement of where the structure was in the accused products, and I'll give you two examples.

For the means for selecting a products catalog to search, claim three of the '683 patent, Dr. Weaver opined as follows, quote: This is Mr. Robertson. In each of these scenarios, all five systems, do they provide the means for selecting a product catalog to search? Answer: Yes.

That is the extent of Dr. Weaver's testimony on that element. Now, there is not just a mere, well, it's not really in dispute, so let's just get it out there. Whether these

claim elements were met is a disputed issue in this case. Dr. Shamos specifically said with respect to the means for selecting product catalogs to search, there is not even remotely any structure in the Lawson accused systems that correspond to this element.

So what I'm telling you is that specifically with respect to the means plus function claims, when the only statement of infringement was, yes, that's met, that is insufficient as a matter of law for this to be sent to the jury. ePlus does not have a basis to find for infringement on these claims.

THE COURT: All right.

MS. HUGHEY: The same issue permeates the system claims, but I wanted to point out the method claims because the Federal Circuit has been so clear that you cannot just make a conclusory statement, you must point out the structure.

THE COURT: All right. Thank you. She just served you up an air ball. Take a swing at it and tell me why she is not right on Dr. Weaver's testimony on means plus function.

MR. ROBERTSON: Well, Dr. Weaver said he faithfully applied the Court's construction, and the Court's construction identified what the structures were that performed the function. Dr. Weaver introduced --

THE COURT: Yes, but did he say what the structures were on the Lawson side? The point she's making, you have to

say what the structures were in the --

MR. ROBERTSON: He did when he went through all the modules and he talked about the guides that talked about the purchase order module, the requisition module, the search program, the order list, the user interface. All those were the structures that the Court defined as performing the various functions. So he went through that first in great detail as to what all those modules were and --

THE COURT: That's all I need. I think that's correct. He didn't in response to that particular question, but the hour or so that preceded that conclusion question dealt with that, I believe, so I don't need to hear any more.

What about this capability thing? These cases she's talking about seems to say -- the copy from Lexus is fouled up. It doesn't have in it -- it's got -- I don't know how it did it, but it begins at one part, what is set out below in another column, and it's almost as if -- one time I had a defendant on the stand when I was a prosecutor, and I showed him a copy of his confession, and his excuse for why the confession wasn't right was that the computer -- that the copier had changed the text of his confession, and I didn't find that very persuasive.

Now, for the first time, I find that a computer may be capable of doing that, so I'm going to get a new copy of the case and see if I can get it right, read the right part of it. And I'm not saying anybody did anything funny. I'm saying that

we think that the computer may have done something here.

MR. ROBERTSON: Let me address that while I can.

THE COURT: You know the case law?

MR. ROBERTSON: I do. I think one of the most instructive cases --

THE COURT: Capability has to be recited as an element of the claim for the capability doctrine to apply according to the case she cited.

MR. ROBERTSON: I don't believe that's the case, Your Honor. Indeed, in fact in this case, I note that it's a simple device. It's a candle, a travel candle, a mechanical device, and there was no evidence -- in fact, this section of the case wasn't right. There was no proof that this travel candle was ever placed in the infringing configuration, and it's clear that the travel candle does not necessarily have to be placed in the infringing configuration.

Now, let me just say, we had ample evidence in here that not only is it capable of doing it, but it, in fact, does it. For example, you will recall Mr. Matias. He testified by deposition. He was a Lawson customer. He had 36,000 catalog items in his database, and he had 3,000 vendor catalogs. You recall that.

I asked Mr. Christopherson. He said you could load entire catalogs. Ms. Albert asked Ms. Raleigh with respect to specific customers, Jackson Health, for example. The statement

of work says they loaded thousands of catalogs into their system. So this isn't a theoretical construct here. We are talking about actual evidence in this case that shows that it performs in this way.

Now, I'd just briefly like to address the grocery list argument, and that is, nobody pays hundreds of thousands of dollars, even millions of dollars once these systems are fully installed and maintained and serviced during the course of their life, to put two catalogs and 15 items on them. They're intended to have robust data in order to be able to perform the kind of purchasing functionality that a large corporation wants to do for its employees, and that was the evidence in this case, and that's just a practical, common sense approach to this stuff.

The documents that we saw that they provided indicated they can do and they, in fact, do load the entire vendor catalog. The PO user guide said expressly that. Indeed, there's no question, these capable-of-infringing cases, Your Honor, often arise in the context of software, because software is a situation where I can turn on some features and turn off other features, or I can decide not to use any features that might be there. Your e-mail and your Microsoft Outlook has a lot of features that I can use my calendar, I can use my task list, I can use --

THE COURT: If the fact that it has it and is there

to be used, it's infringed in that situation even if I don't use it that way.

MR. ROBERTSON: That's exactly right, because it's capable of doing that.

THE COURT: Is that a claim that recites capability?

MR. ROBERTSON: It doesn't have to recite capability. I think -- I haven't had a chance to review this case. We have provided --

THE COURT: He cited *Fantasy Sports Propositions v. Sportsline* in this case, this opinion, and it says, BASC's reliance on cases that found infringement by accused products that were reasonably capable of operating in an infringing manner is misplaced since that line of cases is relevant only to claim language that specifies that the claim is drawn capability parenthetically.

Here, the language of the claims specifies that infringement occurs only if the accused product is configured with the cover being used as a base underneath the candle holder with feet. That the travel candle was reasonably capable of being put into the claimed configuration is insufficient for a finding of infringement.

MR. ROBERTSON: I would respectfully suggest, Your Honor, that all these claims are directed to something that's reasonably capable of performing it, because it says it's an electronic sourcing system comprising, and then it --

THE COURT: Comprising means including but not limited to.

MR. ROBERTSON: Your Honor, exactly right, and then it lays out that you just have to have means for doing this and means for doing that and means for doing that. That's all about does it have the capability --

THE COURT: Means for doing it means it is capable of doing it. Isn't that what that means?

MR. ROBERTSON: I think that's exactly right, and even the ones --

THE COURT: Is there a case that says means for is a capability kind of claim?

MR. ROBERTSON: I don't know as I stand right here, Your Honor. I would direct, Your Honor, to the Hilgraeve case which is listed in our proposed jury instructions, but I have the cite here. 265 F.3d 1336 at 1343, Federal Circuit 2001. It's a case that both Judge Brinkema and Judge Spencer relied on when they issued their capable of infringing instruction.

THE COURT: 265 F.3d what?

MR. ROBERTSON: 1336, 1343. I actually have some familiarity with the *Fantasy Sports* case because I represented the plaintiff in that case at one point in time, and that was a case that was tried before Judge Friedman, and the fact is, there was no evidence that the system was used in the manner that was suggested by the plaintiff.

THE COURT: Is that what the case holds? That's what this case holds -- that's what this case about the travel candle holds, that, in fact, there was no evidence that the travel candle was used in the infringing way.

MR. ROBERTSON: There's amble evidence in this case that it's used in the infringing way, both from Mr. Christopherson and --

THE COURT: Here's the bottom line. I'm the finder of the fact. I would clearly find that there is infringement of everything that Dr. Weaver said, that each system infringed each claim for the reasons he stated. There isn't any question that I would do that.

But I'm not the finder of the fact. So under these facts, under the evidence in this case, don't I have to let the jury decide that case and then come back at the end of the day and see whether that's right? So what I'm inclined to do is reserve judgment on this motion, because I will tell you -- I personally am having real trouble deciding why there's any defense to infringement at all.

MR. ROBERTSON: I understand.

THE COURT: But I believe that I do have to let the case go to the jury subject to my ability to control that, and I'm going to take this motion under advisement, deny the motion of no infringement by Lawson, keep your motion under advisement.

MR. ROBERTSON: I understand, Your Honor. Thank you.

THE COURT: All right, now, invalidity. I believe that -- Ms. Hughey, are you doing that one, too?

MS. HUGHEY: I am, Your Honor, and I promise to be much slower this time.

THE COURT: Because if you don't, you're going to get knee-capped but not buy me.

Let's see. Is this a good place for the court reporters to switch and for us to take a little recess?

(Recess taken.)